No. 8668

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY EARL DUNLAP,
Appellant,

vs.

E. B. SWOPE, Warden of the United States Penitentiary at McNeil's Island, Washington,
Appellee.

Appeal From the District Court of the United States of America, in and for the Western District of Washington, Southern Division.

Brief of Appellant

MAURICE KADISH,
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J. CHARLES DENNIS,
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Appeal from the District Court of the United States of America, in and for the Western District of Washington, Southern Division.

BRIEF OF APPELLANT

ERRATTA

The following errors appear in brief for appellant in the above action:

Page 2, paragraph 6: "That the order of commitment directed that the Count Five be served first, and the others in reverse order."

Should be made to read: "The two year sentence on Count Three, the two year sentence on Count Four, and the six year sentence on Count Five; are to be served consecutively and not concurrently. In other words; the two year sentence on Count Four shall not begin until the expiration of the two year sentence on Count Three; and the six year sentence on Count Five shall not begin until the expiration of the two year sentence on Count Four."

Page 11, CONCLUSION, lines 1 and 2: The date: October 5, 1935; should be made to read: October 7, 1935.

Page 11, CONCLUSION, line 4: The date: October 5, 1937; should be made to read: October 7, 1937.

Page 11, CONCLUSION, lines 4, 5, 6, 7, 8, 9 & 10: "Allowing the petitioner eight days for each month of the sentence, as provided by law for good conduct, petitioner would have received 192 days of good time allowance. Deducting this from October 5, 1937, the petitioner's term, under sentence of two years on the first indictment, would terminate on the 28th day of March, 1937."

Should be made to read: Allowing the petitioner six days for each month of the sentence, as provided by law for good conduct, petitioner would have received 144 days of good time allowance. Deducting this from October 7, 1937, the petitioner's term under sentence of two years on the first count, would terminate on the 15th day of May 1937.

Appellant respectfully prays that the aforesaid corrections be noted, and recorded.

Respectfully submitted,

Henry Earl Dunlap

HENRY EARL DUNLAP. REG.NO. M-11780.

JURISDICTION OF THE COURT

This is an appeal from an Order in the District Court of the Western District of Washington, Southern Division, sustaining the Demurrer of the Government to the Petitioner's Petition, and an appeal from the denial of the application for a Writ of Habeas Corpus, upon an indictment charging the unlawful possession of counterfeit money (Section 277, Title 18, U. S. C.) and the unlawful possession of molds for the manufacture of counterfeit money. (Section 283, Title 18, U. S. C.)

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Appeal From the District Court of the United States of America, in and for the Western District of Washington, Southern Division.

Brief of Appellant

STATEMENT OF THE CASE

Petitioner applied for a Writ of Habeas Corpus, asking his release from the custody of the Warden at McNeil Island Penitentiary. The petition discloses that the sole authority for the Warden to hold petitioner is a final commitment issued by the United States District Court for the Southern District of California, Central Division, on the 7th day of October, 1935.

Briefly and chronologically, the events concerning the imprisonment of HENRY EARL DUNLAP on this appeal are as follows:

1. On the 2nd day of October, 1935, five counts of one indictment were filed against the petitioner in the United States District Court for the Southern District of California, Central Division.

2. Petitioner thereafter pleaded guilty to counts 3, 4, and 5 of the indictment, and counts 1 and 2 were dropped for lack of evidence, or other causes.

3. Pursuant to said pleas of guilty, petitioner was sentenced to serve two years on Counts Three and Four, and six years on Count Five, all to run consecutively, and not concurrently.

4. Pursuant to said judgment, a commitment was issued out of said court to the United States Marshal, dated the 7th day of October, 1935, commanding him to take and keep and safely deliver the petitioner to the keeper or warden or other officer of the United States' Penitentiary at McNeil's Island, forthwith.

5. Petitioner was received at McNeil's Island Penitentiary the 31st day of October, 1935.

6. That the order of commitment directed that the Count Five be served first, and the others in reverse order.

7. The records of McNeil's Island Penitentiary show that the prisoner's conduct has been exemplary, entitling him to good time off.

STATEMENT OF QUESTION INVOLVED

The foregoing statement of fact presents the following question for determination: Whether or not the facts show that but one crime or offense has been committed, and the petitioner is entitled to his release on the ground that having served one sentence for the offense, his continued imprisonment constitutes a double punishment.

ASSIGNMENTS OF ERROR

The court erred in denying the petition of HENRY EARL DUNLAP for a Writ of Habeas Corpus herein, and in remanding him to the custody of E. B. Swope, Warden of the U. S. Penitentiary at McNeil's Island, Washington, to serve the remainder of the sentences heretofore imposed upon him.

ARGUMENT

The petitioner was sentenced for the possession of several denominations of coins, each violating a section of the revised statutes: Title 18, Section 277, U. S. Code, and Title 18, Section 283, U. S. Code.

In 65 Federal 402, U. S. vs. Howell, the defendant was charged in several separate counts, each alleging possession of a different denomination of coins. The court held that though he could be charged in several counts, he could only be sentenced on one.

The court, in Logan vs. U. S., 123 Federal 291, stated that two offenses cannot be created out of the same

criminal act by charging the defendant in one count with having forged a national bank note and in another count with having forged a signature on the same note.

Much the same situation was presented to the court by the case of Hans Nielsen, petitioner, 131 U. S. 176. Here separate indictments had been found against the petitioner under each of two statutes, charging him with co-habitation and also with adultery. On a motion for a writ of Habeas Corpus, it was agreed that a regular judgment of conviction cannot be attacked collaterally by Habeas Corpus. On page 182 of the opinion, it affirmed:

> "It is firmly established that if a court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the defendant who is in prison under and by virtue of it may be discharged from custody on Habeas Corpus."

The court also quoted with approvel Ex Parte Siebold:

> "And if their want of power appears on the record of its condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him."

Ex Parte Siebold, 100 U. S. 371, lays down the rule that personal liberty is so important in the eyes of the law, that the judgment of an inferior court is not deemed so conclusive but that the question of the court's authority to try to imprison the party may be repudi-

ated on a Habeas Corpus which a superior court or judge having authority to issue the writ.

In 198 Federal 72, Charles Munson vs. Robert W. McClaughry, Warden, the following was held:

> "The sentence of a defendant, convicted on two separate counts of an indictment, of burglary of a postoffice building with intent to commit larceny, and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is *ultra vires* and void as to the sentence for the larceny, and after the defendant has satisfied the sentence for the burglary, he is entitled to his release on habeas corpus.
>
> "The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction; and a prisoner held under such excess is entitled to his release by writ of Habeas Corpus.
>
> "The petitioner was indicted, convicted, and sentenced under one count of an indictment to a fine and imprisonment for five years for forcibly breaking into a building used in part as post office, with intent to commit larceny in the part of the building so used, and under another count of the same indictment to imprisonment for one year to begin after the expiration of the sentence for five years, for stealing postage stamps and other property belonging to the Post Office Department of the United States from the same building at the same time that he committed the offense of breaking with intent to commit larceny, charged in the first count of the indictment.

"A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break, with criminal intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same single criminal intent. And there is evidently no limit to the number of offenses into which criminal transaction inspired by a single criminal intent may be divided, if this rule of division and punishment is once firmly established. Bishop, at paragraphs 1062, 1063, and 1064 of his work on Criminal Law, cites authorities on each side of this question, and gives the opinion that 'to make a burglary thus double, and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law'."

It seems to be the established rule that where burglary, with an intent to steal, and stealing at the same

time, are charged in a single count, and there is a general verdict of guilty, the larceny is merged in the burglary, and a sentence for the burglary only can be inflicted, although separate penalties are prescribed by the statutes for burglary and larceny. State v. McClung, 35 W. Va. 280, 13 S. E. 654; Com. v. Hope, 22 Pick. 1; Kite v. Com., 11 Met. 581; Roberts v. State, 55 Miss. 421, 424.

The highest judicial tribunals of Massachusetts, Kentucky, Pennsylvania, and Georgia have decided that burglary with intent to commit larceny and larceny, at the same time and as a part of the same transaction, may not be lawfully punished as separate offenses, because they are parts of a single continuous act, inspired by a single criminal intent. Triplett v. Com., 84 Ky. 193, 1 S. W. 84, 85; Yarborough v. State, 85 Ga. 396, 12 S. E. 650; Com. v. Birdsall, 69 Pa. 482, 485, 8 Am. Rep. 283.

The excess of a sentence beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction; and a prisoner held under such excess alone, is entitled to his release by writ of Habeas Corpus. Ex Parte Lange, 18 Wall. 163, 176, 178, 21 L. ed. 872, 878, 879; Michigan Trust Co. v. Ferry, 99 C. C. A. 221, 231, 175 Fed. 667, 677; Mackey v. Miller, 62 C. C. A. 139, 141, 126 Fed. 161, 163; Ex Parte Peeke (D. C.) 44 Fed. 1016. As the petitioner had satisfied his sentence for the burglary with intent to commit the larceny, and was held only under a void sentence for the larceny committed at the same time and as a part of

the same continuous criminal act, inspired by the same criminal intent as was the burglary, he was entitled to his discharge.

Petitioner claims that although each count charges an offense under a statute of different number, still, inasmuch as they cover the same transaction, he can suffer but one punishment therefor.

In Stevens v. McClaughry, the petitioner had been charged in counts with taking, stealing, and carrying away certain postal matter, and had received a sentence of five years on the first two counts, and five years on the last four counts. Petitioner served the first term of five years and applied for a writ of Habeas Corpus, alleging the offenses of which he was convicted constituted a single continuing criminal act, inspired by the same felonious intent, which was equally essential to each of the offenses charged in the indictment, and the excess over five years, the maximum under Sec. 5469, was beyond the jurisdiction of the court, and void. The court quoted Munson v. McClaughry, 198 Fed. 72; Halligan v. Wayne, 179 Fed. 112; In re Snow, 120 U. S. 274; re Nielsen, 131 U. S. 176; Kite v. Com., 11 Met. 581; Triplett v. Com., 84 Ky. 193; Yarborough v. State, 12 S. E. 650; Com. v. Birdsall, 69 Pa. 482, saying:

> "The principle upon which the decisions in these cases rests is that two or more separate offenses, which are committed at the same time and are parts of a single continuing criminal act, inspired by the same criminal intent which is essen-

tial to each offense, are susceptible to but one punishment."

The court discussed the rule that charges of separate offenses of the same class may be joined in the same separate counts of the same indictment, observing:

"But this rule and the practice under it does not detract from the soundness or effect of the principle that two or more separate offenses which are committed at the same time and are parts of a continuing criminal act inspired by the same indispensable felonious intent are susceptible of but one punishment."

"In order that separate offenses charged in one indictment may carry separate punishments, they must rest on distinct criminal acts, and therefore, if they were committed at the same time and were parts of a continuous criminal act, and inspired by the same criminal intent which is an essential element of each offense, they are susceptible of but one punishment. MUNSON v. McCLAUGHRY, 198 Fed. 72; 117 C. C. A. 180, 42 L. R. A. (N. S.) 302; STEVENS v. McCLAUGHRY, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390."

"The term 'same offense', in Constitutional prohibition against double jeopardy, signifies same criminal act or omission rather than same offense *eo nomine*. (Const. Art. 2, No. 21.) And the State, after electing to prosecute offense in one of its aspects, cannot prosecute for same criminal acts under color of another name." Hunter v. State, 277 Pac. 953.

"Acquittal of charge of making false entries in Federal Reserve Bank's book barred prosecution for false entry relating to same transaction in another book." (12 U. S. C. A. 3592). U. S. v. Adams, 281 U. S. 202, 50 S. Ct. 269, 74 L. Ed. 807.

"After dismissal of indictment for conspiracy to bribe, in language adequate to charge bribery, subsequent indictment for bribery constituted double jeopardy." Ex Parte Getzoff, 286 Pac. 1044. (See Ex Parte Berman, 286, 1043.)

"A single sale of heroin constitutes but one offense, notwithstanding the failure to register, pay special tax, or obtain written order. (26 U. S. C. A. No. 691, et seq.) Ballerini v. Alderholt, 44 Fed. (2d) 352. Separate counts based upon a single sale of heroin, charged the 'same offense,' and supported a plea of double jeopardy."

The point seems well established from this case that the pleadings may set out any number of separate counts and separate indictments for joint offenses, but the prisoner can only be tried and convicted for one offense, if it can be shown by the pleadings and defense that the omission or offense was committed with a singular intent and was one continuous offense inseparable in any part from any part of the other.

In the case at bar, only a single intent motivated the omissions and offenses charged in the indictment, from which it follows that only one sentence could be inflicted on the petitioner and that the sentences on subsequent counts were in excess of the jurisdiction of the court and should be stricken from the record and the

petitioner's discharge be ordered forthwith, petitioner having served the first two year term with the benefit of statutory good time allowance.

CONCLUSION

Petitioner having been sentenced on October 5, 1935, to terms of two, two and six years, on the respective three indictments, his two year period would have been fulfilled on October 5, 1937. Allowing the petitioner eight days for each month of the sentence, as provided by law for good conduct, petitioner would have received 192 days of good time allowance. Deducting this from October 5, 1937, the petitioner's term, under sentence of two years on the first indictment, would terminate on the 28th day of March, 1937.

It is, therefore, respectfully submitted that petitioner having already served past the time as provided for by the sentence on the first indictment, his conduct having been exemplary, as shown by the record, further detention is illegal, and the petition herein should be granted to free the petitioner from any further illegal restraint.

Respectfully submitted,

MAURICE KADISH,
DAVID BAILEY SMITH,
Attorneys for Petitioner.

No. 8668

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY EARL DUNLAP,

Appellant,

—vs.—

E. B. SWOPE, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

BRIEF OF APPELLEE

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Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, **Southern Division**

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The facts involved in the above matter are partially agreed upon by the parties, but appellee desires to make certain additions to the statement of facts as set forth in appellant's brief.

On October 2nd, 1935, the petitioner was indicted by a grand jury in the District Court of the United States for the Southern District of California, Central Division, by an indictment comprised of five counts (Tr. 7, 12). In view of the fact that Counts I and II of that indictment were subsequently dismissed, no further reference need be made thereto (Tr. 7).

Count III of the indictment charged the petitioner with having violated Sec. 277 of Title 18 of the United States Code, in that he had in his possession certain counterfeit *silver* coins at the time and place designated, with knowledge of the fact that said coins were counterfeit, and with intent to defraud. (Tr. 9, 10).

By Count IV of the indictment petitioner was charged with having violated Sec. 278 of Title 18, United States Code, in that he had in his possession certain counterfeit *minor* coins at the time and place designated, which were the identical time and place involved in aforesaid Count III, with knowledge of the fact that said coins were counterfeit, and with intent to defraud (Tr. 10, 11).

By Count V of the indictment petitioner was charged with having violated Sec. 283 of Title 18, United

States Code, in that he had in his possession at the time and place designated, which were the identical time and place involved in aforesaid Counts III and IV, "certain plaster of paris molds in likeness and similitude as to the design and inscription thereon of molds designated for the coining and making of genuine silver coins of the United States, that have been or may hereafter be coined at the mints of the United States" (Tr. 11, 12).

On October 7th, 1935, the petitioner entered a plea of guilty to said Counts III, IV and V, and was sentenced to serve two years on Count III, two years on Count IV, and six years on Count V, the said terms being specifically designated "*to run consecutively*". (Tr. 6, 7.)

The petitioner commenced service of the aforesaid sentence on October 7th, 1935, and has continuously been and now is confined under the direction of the Attorney General of the United States by reason thereof (Tr. 3, 4).

To the petition herein, appellee filed a demurrer based substantially upon the grounds that the petition-

er's petition failed to show that the petitioner's present confinement is illegal or that petitioner should be discharged from his present confinement (Tr. 15, 16).

By order of the District Court, appellee's demurrer was sustained, the petition for writ of habeas corpus was denied, and the petitioner was remanded to appellee to resume the service of his sentence (Tr. 16, 17).

STATEMENT OF THE QUESTION INVOLVED

There are two related questions raised by this petition:

The first is whether petitioner is entitled to be released from confinement when he, admittedly, has not served the period of the lawful sentence imposed upon him;

And the second is whether consecutive sentences may be imposed upon one admittedly guilty of simultaneously violating Secs. 277, 278 and 283 of Title 18, United States Code.

POINTS AND AUTHORITIES

The sentence imposed upon petitioner clearly reflects the intent of the court sentencing him and no doubt arises therefrom.

United States v. Daugherty, 269, U.S. 360, 363.

The restraint of a prisoner must be unlawful before he may be released by a writ of habeas corpus.

McNally v. Hill, Warden, 293, U.S. 131, 138;
Smith v. Johnston, Warden, (CCA9) 83 Fed. (2d) 321, 322;
Hans Neilsen, Petitioner, 131 U.S. 176, 185.

The several statutes under which petitioner was sentenced are distinct in purpose and function, and consecutive sentences may be imposed for simultaneous violation thereof.

Section 277, *Title* 18, U.S.C.A.;
Section 278, *Title* 18, U.S.C.A.;
Section 283, *Title* 18, U.S.C.A.;
Baender v. Barnett, 255 U.S. 224, 227;
Baender v. United States, (CCA9) 260 Fed. 832, 834, cert. den. 252 U.S. 586;
Johnston v. Lagomarsino, (CCA9) 88 Fed. (2d) 86.

The cases and rulings relied upon by the appellant furnish no authority for his discharge by writ of habeas corpus.

United States v. Howell, (D.C. Cal.) 65 Fed. 402, 407;

Logan v. United States (CCA6) 123 Fed. 291;

Hans Neilsen, Petitioner, 131 U.S. 176, 182;

In re Coy, 127 U.S. 731. 758;

Halligan, Warden v. Wayne (CCA9) 179 Fed. 112;

Munson v. McClaughry, Warden, (CCA8) 198 Fed. 72;

Ex parte Lange, 85 U.S. 163;

Michigan Trust Co. v. Ferry, (CCA8) 175 Fed. 667, 677;

Mackey v. Miller, (CCA9) 126 Fed. 161;

Ex parte Peeke (D. C.) 144 Fed. 1016;

Stevens v McClaughry, (CCA8) 207 Fed. 18;

Ballerini v. Aderholt, (CCA5) 44 Fed. (2d) 352.

ARGUMENT

THE SENTENCE IMPOSED UPON PETITIONER LEAVES NO DOUBT AS TO THE INTENT OF THE COURT WHICH IMPOSED THAT SENTENCE.

The petitioner has in no way questioned the fact that the sentence imposed upon him by the United States District Court for the Southern District of California, Central Division, in all particulars clearly expresses the intent that court had at the time the sentence was pronounced. The sentence reveals that the court intended to impose a total term of imprisonment of ten years upon petitioner. In such respect the sentence is in accord with the rule prescribed by the Supreme Court in the case of *United States v. Daugherty*, 269 U.S. 360, 363.

RESTRAINT MUST BE UNLAWFUL BEFORE A PRISONER MAY BE RELEASED BY WRIT OF HABEAS CORPUS.

By the provisions of Section 283, Title 18, United States Code, which statute was the basis of Count V

of the indictment here involved, a maximum term of ten years may be imposed upon one found guilty of having violated that statute. The prisoner plead guilty to said Count V and a sentence of six years' imprisonment was thereupon imposed on him. The petition reveals on its face that petitioner has not completed service of that portion of the sentence and he is, for that reason alone, not entitled to be presently discharged by writ of habeas corpus. Until a prisoner has completed the portion of the sentence which he admits to be valid, he is in no position to urge the invalidity of a claimed invalid portion of such sentence.

McNally v. Hill, Warden, 293 U.S. 131, 138;

Smith v. Johnston, Warden, (CCA9) 83 Fed. (2d) 321, 322;

Hans Neilsen, Petitioner, 131 U.S. 176, 185.

Petitioner makes no statement or contention that the sentence imposed upon him for violation of Count V is, in any manner, in excess of that court's jurisdiction, and his discharge under writ of habeas corpus is thereby precluded.

THE SEVERAL STATUTES UNDER WHICH PETITIONER WAS SENTENCED ARE DISTINCT IN PURPOSE AND FUNCTION AND CONSECUTIVE SENTENCES MAY BE IMPOSED FOR SIMULTANEOUS VIOLATION THEREOF.

Section 277 of Title 18, United States Code, upon which Count III of the instant indictment was based, provides a maximum term of imprisonment of ten years. The petitioner was sentenced to serve two years for violation of that statute.

The charge embraced by the statute and said Count III is that the petitioner knowingly possessed a certain number of counterfeit *silver* coins, with intent to defraud. That section of the statute and Count III are distinguishable from Section 278, Title 18, United States Code, and Count IV of the indictment, respectively, in that the latter statute and charge relate to the knowing possession of counterfeit *minor* coins, with intent to defraud. Section 278, Title 18, United States Code provides a maximum term of imprisonment of three years for violation thereof, and the petitioner was sentenced to serve two years for that act.

Both Section 277 and Section 278 of Title 18, United States Code may be readily distinguished from Section 283, Title 18, United States Code, which forms the basis of the charge as laid in Count V of the indictment in question. A comparative reading of Counts III, IV and V of the indictment, and the statutes upon which they are based, patently reveals that, whereas the element of intent must be charged and proven in respect to said Counts III and IV, no such necessity exists with respect to Count V, where the element of intent need not be charged or proven.

Baender v. Barnett, 255 U.S. 224, 227;

Baender v. United States, (CCA9) 260 Fed. 832, 834, cert. den. 252 U.S. 586.

The two cases last cited clearly point out that the lawful and knowing possession of prohibited molds or dies constitutes the criminal offense prohibited by Section 283, Title 18, United States Code. Admitting for the purpose of argument only that petitioner's contention might be correct if we were considering only Counts III and IV of the indictment, which involved the simultaneous possession of counterfeit silver and minor coins, petitioner's contention entirely overlooks

the distinguishing features of Section 283, Title 18, United States Code.

The reasoning employed in petitioner's brief would lead to the result that the longer terms of imprisonment provided by Sections 283 and 277 of Title 18, United States Code, as compared to Section 278 of Title 18, United States Code, could always be avoided by one violating those laws, if he were merely to be certain to have on his person and in his possession a few counterfeit *minor* coins at the same time he possessed counterfeit *silver* coins, and molds and dies for the making of counterfeit silver coins. Upon being indicted and found guilty of all such offenses, that person could then, under petitioner's reasoning, only be sentenced to serve the maximum term provided by Section 277 of Title 18, United States Code: that is, two years.

That such construction is not in harmony with the apparent intent of the Congress in enacting the several measures and providing for varying terms of imprisonment, admits of no argument.

In the case of *Johnston v. Lagomarsino,* (CCA9) 88

Fed. (2d) 86, 87, the court quotes from the decision of the *United States v. Lacher*, 134 U.S. 624, as follows:

> "It appears to me * * * that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Following that rule of construction and the further ruling contained in the last cited case on page 88 of that decision,

> " * * * every presumption must be indulged in favor of the judgment and sentence."

It appears that the construction contended for by appellee, and approved by the District Court herein, is correct.

NONE OF THE AUTHORITIES RELIED UPON BY APPELLANT FURNISH GROUNDS FOR HIS DISCHARGE BY WRIT OF HABEAS CORPUS.

In *United States v. Howell*, (D. C. Cal.) 65 Fed. 402, 407, the point decided was that an indictment charging possession of counterfeit money, containing several separate counts, each relating to a different denomination of coin, was valid and sufficient. No question there arose as to what effect the simultaneous possession by the defendant of molds and dies for the making of counterfeit silver coins would have had in relation to the charges there involved. No judgment or sentence was before that court for decision.

Logan v. United States, (CCA) 123 Fed. 291, merely holds that one may not be doubly convicted. That is, convicted of both forging a national bank note and forging the signature of identically the same note. That is patently correct.

We have no quarrel with the general rules which appellant has quoted from the cases of

Hans Neilsen, Petitioner, 131 U.S. 176, 182;
In re Coy, 127 U.S. 731, 758,

but point out that petitioner's quotation (p. 4, appellant's brief), purportedly from *Ex parte Seibold*, 100 U.S. 371, is derived from the case of *In re Coy*, supra.

Many of the cases relied upon by petitioner are concerned with the established rule that one may not be required to serve consecutive sentences upon conviction for burglary with intent to commit larceny, and of larceny committed at the same time and as part of a continuous criminal act. The cases cited by petitioner from the various state court jurisdictions, while perhaps persuasive, are not controlling, and no reference is here made to them because the matters here in question have been previously ruled upon by the federal courts.

Such a federal court ruling upon the point just above mentioned is found in *Halligan, Warden v. Wayne*, (CCA) 179 Fed. 112, to the effect that the defendant could not be sentenced separately for burglary or larceny committed as part of a continuous offense. In such case proof of one of those offenses so committed necessarily imports and includes proof of the other. That may not be said of the three offenses which are here in question.

Petitioner places reliance upon *Munson v. McClaughry*, (CCA8) 198 Fed. 72. That decision goes further than petitioner has indicated, and at page 77 of the decision its holding is in line with appellee's contention that only "the excess of a sentence beyond the jurisdiction of the court which renders it is void", and by inference holds that where a prisoner has not satisfied the valid portion of the sentence imposed upon him, he is not entitled to be discharged. The same may be said of *Ex parte Lange*, 85 U.S. 163.

The case of *Michigan Trust Co. v. Ferry*, (CCA8) 175 Fed. 667, 677, cited by petitioner, is a civil matter in which, by reason of failure of proper service and pleading, it was held that the court acted beyond its jurisdiction in certain respects. It has not been shown how that decision aids the petitioner here.

In *Mackey v. Miller*, (CCA9) 126 Fed. 161, cited by petitioner, it was held that those imprisoned were so confined under a sentence rendered upon a state of facts constituting *no offense* against the government, that the sentence was void on its face, and habeas corpus was the proper remedy. That case is most readily distinguishable from the instant matter.

Petitioner further relies upon *Ex parte Peeke*, (D.C.) 144 Fed. 1016, and *Stevens v. McClaughry*, (CCA8) 207 Fed. 18. In each of the two cases last cited it was pointed out that only the excess of a sentence imposed, which is beyond the jurisdiction of the court rendering it, is void.

Further reliance is placed by petitioner upon *Ballerini v. Aderholt*, (CCA5) 44 Fed. (2d) 352, wherein it is held that separate counts in an indictment based upon one sale of heroin charged but one offense. Appellant quotes therefrom the established rule, namely, that in determining what is the same offense, the test applied is whether, if what is set out in the second indictment (or count) had been proved under the first, there could have been a conviction. Certainly the petitioner cannot here contend that sufficient proof that he possessed counterfeit *silver* coins with intent to defraud, would be adequate to prove that he possessed molds and dies for the making of counterfeit silver coins, or vice versa. Obviously, the three counts here in question do not charge the same offense, and proof of each of them must be based upon different and distinctive facts.

CONCLUSION

The District Court, after hearing this matter, concurred in appellee's foregoing conclusions. It is respectfully submitted that the order of the District Court sustaining appellee's demurrer and denying the relief herein sought was correct, and should be affirmed; that the petitioner has not completed service of a sentence lawfully imposed upon him by the United States District Court for the Southern District of California, Central Division; that petitioner is now lawfully confined, and is not entitled to be discharged.

Respectfully submitted,

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